In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1204

STERLING KEITH ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the stop and search of his vehicle by a Border Patrol officer were unreasonable under the Fourth Amendment and that statements made by him after he was given *Miranda* warnings and initially determined to remain silent should have been suppressed.

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiring to possess 427 pounds of marihuana (count 1), possessing marihuana with intent to distribute it (count 2), using a communication facility to import marihuana (count 3), and conspiring to import marihuana (count 4), in violation of 21 U.S.C. 841, 843, 846, and 963. He was acquitted on an importation charge (count 5). Petitioner was sentenced to consecutive terms of five years' imprisonment to be followed by two years of parole on each of counts one, two, and four,

and four years' imprisonment on count three, to run concurrently with the sentence on count four. The court of appeals affirmed the convictions but vacated the sentence and remanded to the district court for resentencing (Pet. App. 1a-13a; 504 F. 2d 1079).

The evidence showed that in the early morning hours on Sunday, October 7, 1973, Border Patrol Agent Thompson, driving a marked vehicle, was patrolling a sparsely settled area on a gravel road parallel to and about a quarter mile from the Rio Grande River in Texas (Tr. 8-9, 32-33). The river is normally dry at the point where Thompson was patrolling, and it was a known crossing point for illegal aliens (Tr. 32, 45).

At about 6:30 a.m., prior to sunrise, Agent Thompson observed a pickup truck with a camper on the back approaching him from the direction of the river with its headlights out (Tr. 9-12). His suspicions aroused, the officer pulled over and parked the patrol car on the right side of the road to observe the approaching vehicle (Tr. 9-10). When the driver of the truck was close enough to realize that the parked car was a patrol vehicle, he switched on the truck's headlights and speeded up (Tr. 11).

After the truck passed him, the officer made a U-turn and began to follow it. The truck was by then traveling "at a very high rate of speed" and appeared to the officer to be "trying to get away from me or trying to get out of the area" (Tr. 12). Agent Thompson activated his siren and red lights and pursued the truck at speeds reaching 100 miles per hour (Tr. 12-13, 16-17). The truck left the road, drove through several cotton fields, crashed through a barbed-wire fence, and entered another road (Tr. 13-14). While the truck was passing through the fields, its contents bounced up in

the back of the pickup, and the officer was close enough to see several clear, large plastic sacks that appeared to contain marihuana (Tr. 14-15).

Agent Thompson attempted to draw alongside the truck, but the driver several times swerved toward the center of the road preventing the officer from passing (Tr. 15-16). Agent Thompson then discharged his firearm in the air (Tr. 17). The truck left the road again, entered a field on a farm, and, after a second warning shot, came to a halt between two shacks on the farm (*ibid.*). The driver ran from the truck, and Agent Thompson pursued him on foot (*ibid.*). As the officer passed the truck, he again saw the plastic sacks and detected a strong odor of marihuana (*ibid.*). The officer later found petitioner lying face down between two rows of cotton (Tr. 18).

Agent Thompson arrested petitioner and immediately gave him *Miranda* warnings (Tr. 19). After the two men had walked back to the patrol vehicle, Thompson again read petitioner *Miranda* warnings from a card and searched his person (Tr. 19-20). Petitioner indicated that he understood his rights and that he did not wish to waive them (Tr. 20). A search of the truck revealed 427 pounds of marihuana, a walkie-talkie, a battery pack, an extra antenna, and a police scanner (Tr. 19-20, 26-27).

Special agents of the Drug Enforcement Administration arrived at the scene and took custody of petitioner and his vehicle. As one of the agents attempted to start the truck, petitioner spontaneously stated to another agent, "If he's trying to start that vehicle, it will not run. I think I burned the engine out of it" (Tr. 55). Agent Baden then drove petitioner to the DEA office at the Bridge of the Americas port of entry. Baden, who was

aware that Thompson had advised petitioner of his rights but not that petitioner had declined to waive them (Tr. 70), once again gave petitioner *Miranda* warnings, and petitioner stated that he understood them (Tr. 57-58, 65-66). The two men then engaged in a conversation during the 30 to 45 minute ride (Tr. 58, 61). Baden testified: "We were carrying on a conversation. There was a certain rapport that had just developed. * * * He was trying to sell me his jack-knife, his boots and things like this and it was just conversation" (Tr. 63).

In the course of the conversation, Baden asked petitioner where the other walkie-talkie was, and petitioner stated, "They were in the area but they must have gotten paranoid and split" (Tr. 58, 67). Petitioner stated, "not in response to a question, that he had driven his vehicle * * * down to the [river levee] and that some Mexicans that he did not know had loaded it" (Tr. 59, 67). Petitioner also acknowledged that he had purchased the radio equipment (Tr. 58, 66).

Petitioner was again advised of his rights at the DEA office (Tr. 77-78). DEA Special Agent Compton asked him whether the 427 pounds of marihuana was the amount he was supposed to have received. He responded that "he wasnt [*sic*] supposed to have gotten any marijuana, he said he was stupid for picking it up, that he wasn't supposed to pick it up, but that he did" (Tr. 78).

1. Petitioner contends (Pet. 9-21) that the stop and search of his vehicle violated the Fourth Amendment's proscription against unreasonable searches and seizures. Although we have argued in *United States* v. *Brignoni-Ponce*, No. 74-114, that a Border Patrol officer may lawfully stop a vehicle in the Mexican border area without any particularized suspicion focused upon the vehicle to be stopped, there is no need to hold this case pending the decision in *Brignoni-Ponce*.

As the facts stated above clearly show, the officer here had a particularized founded suspicion focused on petitioner's vehicle that justified his initial effort to make an investigative stop. The truck was in a sparsely populated area about 300 yards from the Mexican border, near a river crossing point commonly used by illegal aliens; it was driving without headlights at a time when the officer would have expected headlights to be used; and the driver switched on the headlights and quickly accelerated when he saw the Border Patrol vehicle. These articulable facts were sufficiently suspicious to warrant a stop for the purpose of investigation. Petitioner's actions after the officer began to follow the truck, and the officer's observation that the truck appeared to contain packages of marihuana, plainly gave him probable cause to believe that a crime was being committed and justified the arrest and subsequent search of the truck.

Thus, while we agree with the court of appeals that "these circumstances create a nexus with the border that is sufficient to make this a border search" (Pet. App. 4a), the existence of particularized probable cause makes it unnecessary to rely on a border search rationale. The officer's actions were lawful under traditional doctrines of founded suspicion and probable cause.

2. Petitioner also argues (Pet. 21-26) that, because he initially indicated that he would not waive his *Miranda* rights, the officers acted improperly in engaging him in the conversation in which he made incriminating remarks. In petitioner's view, the question is whether "a defendant [may] impliedly rescind an articulated refusal to waive Fifth Amendment rights simply by responding to interrogation after repeated warnings of

his right to remain silent" (Pet. 23). A similar issue is before this Court in *Michigan* v. *Mosley*, No. 74-653.

The facts of this case, however, do not present the question posed by the petition, and there is no need to defer disposition of the petition pending the decision in *Mosley*. As our statement of the facts indicates, petitioner spontaneously stated, after two sets of warnings, that he had burned out the engine of his truck. After a third warning, he freely engaged in casual conversation with Agent Baden, stating, not in response to any question by Baden, that he had driven the truck to the river, where other persons had loaded it with marihuana. After yet a fourth warning, petitioner voluntarily stated that he had picked up the marihuana and was stupid to have done so.

This is not a case in which the officers repeatedly sought a waiver of rights or renewed their interrogation after failing to secure such a waiver. It is a case in which the accused himself initiated conversation after an initial refusal to waive his rights and, after further warnings, freely answered questions and volunteered information. The record here fully supports the ruling of the court of appeals that petitioner was effectively advised of his rights and that he intelligently and understandingly declined to exercise them (Pet. App. 6a-7a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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